UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PAUL G. MORSE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-108-P-H***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeals concerns only the date of onset of the plaintiff's disability. I recommend that the commissioner's decision be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520, *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since his alleged onset date, April 1, 1998, Findings 1-2, Record at 13; that his statements concerning his impairments and their impact on his ability to work prior to April 2, 2000 were not entirely credible in light

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 11, 2003, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

of the medical history, Finding 3, *id*.; that from the alleged onset date until April 2, 2000 he did not have any impairment or combination of impairments that was severe, Finding 4, *id*. at 14; and that he was, therefore, not under a disability as defined in the Social Security Act during the period from the alleged onset date to April 2, 2000, Finding 5, *id*. The administrative law judge did find that the plaintiff was disabled as a result of diabetes mellitus and essential hypertension after April 2, 2000, Findings 6-14, *id*. The Appeals Council declined to review the decision, *id*. at 3-4, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

With respect to the period before April 2, 2000 the administrative judge reached Step 2 of the sequential evaluation process. At Step 2, the commissioner decides whether any impairment or combination of impairments is severe. 20 C.F.R. § 404.1520(c). An impairment or combination of impairments is not severe if it does not significantly limit the claimant's physical or mental ability to do basic work activities. 20 C.F.R. § 404.1521(a). An impairment "must be established by medical evidence." 20 C.F.R. § 404.1508. Although the plaintiff bears the burden of proof at Step 2, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986).

The plaintiff correctly points out, Plaintiff's Itemized Statement of Errors ("Itemized Statement") (Docket No. 4) at 3, that a date of onset may be established by reasonable inference, Social Security Ruling 83-20 ("SSR 83-20"), reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 51. However, "[t]he medical evidence serves as the primary element in the onset determination," *id*. at 50, and the onset date "can never be inconsistent with the medical evidence of record," *id*. at 51. A reasonable inference as to onset date "must have a legitimate medical basis." *Id*. If reasonable inferences about a progressive impairment cannot be made on the basis of the medical evidence in the record and additional relevant medical evidence is not available, other information may be considered. *Id*.

The alleged date of onset is elusive in this case. The administrative law judge's opinion gives it as April 1, 1998. Record at 10, 13. At the hearing before the administrative law judge, counsel for plaintiff appeared to amend this date, which had been used in the plaintiff's application for benefits, to January 1, 1999. Record at 143-45. In the statement of errors, the same lawyer contends that onset may be inferred as of six months prior to October 2000[2] and as of "the summer of 1999." Itemized Statement at 3 & n.7. Neither of these inferences would meet either of the alleged onset dates presented to the administrative law judge. At oral argument, counsel chose July 1999 as the onset date. Whatever the correct date may be, there is simply no medical evidence sufficient to allow the drawing of an inference that any impairment existed on any of these dates.

The plaintiff relies on "evidence from Dr. McGrath as of October, 2000 . . . that the Claimant suffered from a disabling cardiac condition" and his testimony and that of his wife "that he was very limited in his physical activities from 1999 and thereafter." *Id*. at 3. The only records or reports in the

[2] The plaintiff was awarded benefits as of April 2, 2000, Record at 13-14, which is approximately six months before October (*continued on next page*)

administrative record from Dr. McGrath are found at pages 122-27. Nothing in those documents can reasonably be construed to suggest that the plaintiff's cardiac condition was progressive or that it existed before April 2, 2000. The plaintiff offers no case-law authority for the proposition that congestive heart failure, Dr. McGrath's diagnosis, Record at 122, is by definition a slowly progressive disease such that it may have reached the stage of a severe impairment at some particular point in time before Dr. McGrath made his diagnosis. In the absence of any medical evidence or case-law authority, there can be no "legitimate medical basis" for the drawing of an inference under SSR 83-20, and the administrative law judge was not required to consider the testimony of the plaintiff and his wife.[3]

The plaintiff also contends that the administrative law judge was required to seek the testimony of a medical expert at the hearing in order to analyze the "highly technical record of the evaluation and treatment of the Claimant's congestive heart impairment." *Id*. I assume that he makes this argument with respect to the evidence concerning the date of onset, although that is not clear from the itemized statement.[4] SSR 83-20 provides that the administrative law judge "should call on the services of a medical advisor when onset must be inferred," SSR 83-20 at 51, but that situation arises only when there is some medical evidence that would allow the drawing of an inference. *See, e.g., Walton v. Halter*, 243 F.3d 703, 709 (3d Cir. 2001) (medical advisor must be consulted when impairment is slowly progressive, medical evidence is ambiguous and retroactive inference is necessary); *Grebenick v. Chater*, 121 F.3d 1193, 1200-01 (8th Cir. 1997)

2000.

[3] With respect to testimony that could possibly be related to the plaintiff's "cardiac condition," the only impairment mentioned in his discussion of the date of onset, Itemized Statement at 3, the plaintiff testified that he was working in 1999 but "probably didn't average 20 hours a week," Record at 149; that he had to stop doing roof work "two years ago," *id.* at 151 (the hearing was held on July 24, 2002, *id*. at 141); and that he was short-winded in 1999, *id*. at 152. His wife testified that he would have had problems walking 100 feet in 1999. *Id*. at 162.

[4] If, rather, the argument is that a medical expert was required to evaluate the medical evidence in general, it fails. The First Circuit has held that "[u]se of a medical advisor in appropriate cases is a matter left to the [Commissioner's] discretion; nothing in the Act or regulations requires it." *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 5 (1st

(*continued on next page*)

(same); *Spellman v. Shalala*, 1 F.3d 357, 362-63 (5th Cir. 1993) (same). The plaintiff has cited no such evidence in this case.

Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 16th day of December 2003.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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